Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2023

JOSE PATINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD S. PANZER
Attorney for Petitioner
299 Broadway
New York, New York 10007
(212) 349-6128

PAUL E. WARBURGH, Jr.
CHARLES F. AXELROD
Of Counsel

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Jose Patino, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The Court of Appeals affirmed petitioner's judgment of conviction by summary order. (Appendix, *infra,* 12). The opinion of the district court (Appendix, *infra,* 14) is reported at 482 F. Supp. 245.

Jurisdiction

The judgment of the Court of Appeals was entered on May 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals was in error in concluding that the investigatory stop of petitioner was based on reasonable suspicion and in failing to suppress all seized items as the product of an illegal arrest.

2. Whether the Court of Appeals was in error in concluding that the petitioner consented to the search of his shoulder bag and the search of two apartments.

3. Whether the indictment should have been dismissed because of improper police conduct in the course of the investigation.

Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution.

The pertinent text of the foregoing provisions is set forth in Appendix, *infra,* 35.

Statement of the Case

Petitioner, Jose Patino, was charged in a one count indictment with conspiracy to distribute and possess with intent to distribute quantities of cocaine in violation of Sections 841(a)(1), 846 of Title 21, United States Code. He was convicted under this indictment based on his guilty plea entered in the United States District Court for the Eastern District of New York.

Petitioner moved for suppression of a quantity of cocaine and other items seized from him on the ground that his Fourth Amendment rights had been violated. After an

evidentiary hearing the district court denied petitioner's motion to suppress.

Thereafter, petitioner pleaded guilty to the indictment preserving with the consent of the government his right to appeal to the district court's denial of his suppression motion. The district court then sentenced petitioner to a term of imprisonment of eight years with a special parole term of ten years. The Court of Appeals affirmed the conviction.

Initiated by information received from a confidential informant, the prosecution in the instant case arose out of a Drug Enforcement Administration investigation concerning a cocaine trafficking ring operating in Queens, New York. The informant advised that the ring used red cars, beepers for communications, and stash locations to store cocaine.

In the fall of 1978 and continuing into 1979, surveillance was conducted of various individuals associated with the ring. Petitioner was observed on several occasions. On October, 1978, he was seen driving a red Chevrolet identified by the agents as one of the cars used to deliver cocaine. He was observed wearing a voice activated beeper, and agents observed him opening the trunk of another car which had been involved in a drug transaction. On January, 1979, petitioner was seen in the company of one Victor Crespo, a known cocaine dealer.

In April, 1979, surveillance began of Apartment 11F, 41-40 Union Street, suspected in connection with the operation of the drug ring.

On July 10, 1979, a Detective Robinson learned from the superintendent of 41-40 Union Street that he had not recently seen anyone going out of Apartment 11F although the rent for July and August had been paid. With Robinson staying out of sight the superintendent opened the door to Apartment 11F. Robinson looked inside and then

proceeded to walk in. Inside the apartment, Robinson found a machine for detecting counterfeit bills, a pile of rubberbands with a $10 bill on top, and an adding machine which contained a figure of over $100,000.

On July 26, 1979, petitioner was stopped by Drug Enforcement Administration agents as he was leaving Apartment 11F carrying a shoulder bag and a black leather carrying case. The agents did not recognize petitioner from their previous encounters until after he told them his name. They then asked if they could look through the carrying case. No guns were found. The agents then requested to be let into Apartment 11F. Petitioner opened the door and was followed in by the agents. With no objection from petitioner, the agents began to search the apartment and the shoulder bag petitioner had been carrying. Again no guns were found.

Petitioner was then escorted by agents to an address he gave as his home in a government car. He was then driven by agents in a government car to 66-01 Burns Court, an address found on a money order receipt taken from the shoulder bag. Using keys given to them by petitioner, agents opened the door of Apartment 1CC and walked in. Inside they discovered cocaine and guns.

The following day agents returned to Apartment 1CC, 66-01 Burns Court, with a search warrant. They seized cocaine, guns and other evidence pursuant to the warrant, most of which had been discovered the previous day during the warrantless search.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals was in error in concluding that the investigatory stop of petitioner was based on reasonable suspicion and in failing to suppress all seized items as the product of an illegal arrest.

The police have no license to stop individuals in public places on a bare suspicion or on intuition that they may be criminals, and it certainly does not permit random stops in an effort to turn something up. *Terry* v. *Ohio,* 392 U.S. 1, 20 L.Ed.2d 889 (1967); *United States* v. *Brignoni-Ponce,* 442 U.S. 873, 45 L.Ed.2d 607 (1975). "In every case the police officer must be able to point to specific and articulable facts which taken together with reasonable inferences from those facts reasonably warrant intrusion." *Terry* v. *Ohio, supra,* 392 U.S. at 21.

At the time of the stop, the agents did not even know the identity of the person they were stopping. It was after the stop that they realized that it was petitioner. The only thing that the agents could point to to justify the stop was that a number of telephone calls had been made to and from the telephone located in the apartment. The telephone calls were several months prior to the date on which they stopped petitioner and therefore their value as a basis for stopping petitioner had obviously diminished.

Further, the *Terry* stop was intended to apply to those situations where a police officer discovers suspicious activity of which he was previously unaware. It is this element of surprise that poses the possibility of danger to the officer and public and therefore, requires prompt action. A *Terry* stop does not apply to the subject of a continuous police investigation where a necessity for prompt action does not exist. To allow such stops would

eliminate the requirement of warrants contrary to the admonition of *Terry*. Moreover, the doctrine enunciated in *Terry* does not cover investigative stops such as the one in this case. See *Dunaway* v. *New York*, —— U.S. ——, 60 L.Ed.2d 824, 834 (1979).

Therefore, from the moment he was escorted back into the apartment and seated petitioner was under arrest. See: *United States* v. *Barnes*, 443 F.Supp. 137 (S.D.N.Y. 1977) aff'd 604 F.2d 121 (CA2 1979); *United States* v. *Washington*, 249 F.Supp. 40 (D.C. 1965), aff'd 401 F.2d 915 (CA DC 1968). The agents could not say that he could leave and petitioner believed that he could not leave. His liberty of movement was restricted. *Henry* v. *United States*, 361 U.S. 98, 103 (1959).

No probable cause existed for petitioner's arrest. All the events giving rise to the information possessed by the agents occurred many months prior to the arrest.

Since the arrest was improper the search of petitioner's shoulder bag on probable cause principles also was improper. See: *United States* v. *Ester*, 442 F.Supp. 736 (S.D.N.Y. 1978). Moreover, a warrant was needed to search the bag. *Arkansas* v. *Sanders*, —— U.S. ——, 99 S.Ct. 2568 (1979); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *United States* v. *Dein*, 609 F.2d 1038 (CA2 1979).

II

The Court of Appeals was in error in concluding that petitioner consented to the search of his shoulder bag and the search of two apartments.

When consent is relied upon to justify a warrantless search, the burden is on the government to prove by clear and positive evidence that the consent was freely and voluntarily given. *Bumper* v. *North Carolina,* 391 U.S. 543, 548, 20 L.Ed.2d 797 (1968). Consent is not lightly to be inferred. "Voluntariness is a question of fact to be determined from all the circumstances . . .". *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 248-249. See: *United States* v. *Faroulo,* 506 F.2d 490, 493 (CA2 1974); *United States* v. *Mapp,* 476 F.2d 67, 78 (CA2 1973). In order to be voluntary, consent must be unequivocal, specific, and intelligently given. *Judd* v. *United States,* 190 F.2d 649 (CA DC 1951); *Channel* v. *United States,* 285 F.2d 217 (CA9 1960). In determining voluntariness consideration is given to a multitude of factors including the subjective state of the person; subtle coercive police questions; the custody status of the person; information given to the person about his rights; number of police involved; and knowledge of the person that the police have weapons.

In the instant case from an examination of "all the circumstances" it is obvious the government has not satisfied its burden that the petitioner's consent was freely and voluntarily given. Immediately upon the petitioner's exit from his apartment he was stopped by two agents who displayed badges and told him they were federal agents. His shoulder bag was taken from him. He was not given *Miranda* warnings but was immediately questioned. Petitioner was suffering from severe apprehension and anxiety and was in a panic mentally. He was escorted back into the apartment. The petitioner was told to be seated and then additional agents totaling at least eight arrived and

entered. Some of their guns were partially visible and at times the agents placed their hands at the ready to use them when there were knocks on the door. Petitioner was not free to leave and believed that he was in custody.

Petitioner's acquiescence to the search of the Union Street apartment and his shoulder bag were both equivocal and based on submission to apparent lawful authority. A mere disclaimer that petitioner is not guilty or the premises are not his, with a reply such as "so go ahead and search", is not sufficiently specific to provide voluntary consent, *Judd* v. *United States, supra; United States* v. *Smith,* 308 F.2d 6657 (CA2 1962). Even where the defendant denied his guilt and encouraged the search, it has been held the consent was not voluntary. *Channel* v. *United States, supra.* See: *Calanotte* v. *United States,* 208 F.2d 264, 266 (CA6 1953). "The house is yours, you won't find any narcotics here.' *United States* v. *Kowal,* 197 F.Supp. 401, 403, 405 (DCRI 1961). "We are going to look around and search the place. Do you mind?" "No go right ahead."

The prosecutor's burden of proving voluntary consent cannot be met by merely showing acquiescence to a claim of lawful authority. *Bumper* v. *North Carolina, supra. United States* v. *Ruiz-Estrella,* 481 F.2d 723 (CA2 1973).

Consent searches must be carefully scrutinized for evidence of coercion or duress, especially in the absence of a written waiver or warning concerning one's Fourth Amendment rights. *United States* v. *Richiarante,* 445 F.2d 126, 138 fn 1 (CA7 1971).

The apparent lawful authority and overwhelming physical presence of armed officers negates any consent that was based on the equivocal responses of petitioner, rather than establishing freely given consent, the circumstances indicate mere resignation to an inevitability. *United States* v. *Alberto,* 120 F.Supp. 171 (S.D.N.Y. 1954). See: *United States* v. *Gregory,* 204 F.Supp. 884 (S.D.N.Y. 1962) ("you can look if you like"): *United States* v. *Reincke,* 229

F.Supp. 132 (Conn. 1964). The threatening atmosphere continued to exist as he was chauffeured from place to place. In the cars that transported him petitioner was always placed in the back seat with one agent while another drove. At the various locations there was always a minimum of four or five agents guarding him.

At the Burns Court apartment petitioner's panic was heightened by the anticipation of what would be discovered. Under the circumstances there certainly could not have been any consent by petitioner to the entry by the agents into the apartment. Voluntary consent under these circumstances was highly improbable. *Higgins* v. *United States,* 209 F.2d 819 (CA DC 1954); *Channel* v. *United States, supra; United States* v. *Pate,* 222 F.Supp. 998 (N.D. Ill. 1963).

The fact that petitioner made no objection to the use of the keys could not have been considered permission to enter the apartment. In fact, the agents believed at the time, that petitioner had no association with any apartment in the building other than that he had friends living there. Therefore, they should have known that petitioner could not have consented to their entry. A person with no present interest in premises cannot authorize police entry into them. The entry into the apartment at Burns Court was completely unlawful.

Moreover, the entry into the Burns Court apartment was beyond the scope of any consent extracted from petitioner. There was no request to search the apartment, nor to have him accompany them in the process of such search. Petitioner's response was a disclaimer of any right to consent to a use of the keys and clearly did not authorize a search of the apartment but at best an absence of objection to testing the key. "A consent search is reasonable only if kept within the bounds of the actual consent", *United States* v. *Richiarante,* 445 F.2d 126, 129 (CA7 1971).

III

The Court of Appeals was in error in concluding that the indictment should not be dismissed because of improper police conduct in the course of the investigation.

On July 10, 1979, Detective Robinson without any legal authority whatsoever, entered Apartment 11F at 41-40 Union Street. Detective Robinson's conduct at the very least was grossly improper and at the very most the crime of Criminal Trespass. As an experienced police officer he knew he had no right to enter the apartment. The rent was paid and the superintendent could not give him permission to enter. But in disregard of law he entered and examined the apartment and its contents.

Under these "limited and extreme circumstances" the indictment should have been dimissed. See: *United States* v. *Broward,* 594 F.2d 345, 351 (CA2 1979).

> "Those whose duty it is to enforce the law must obey the law themselves. Violations such as those in this case are at best short-sighted. Their immediate effect may be to jeopardize investigations and prosecutions which otherwise might be fruitful. The ultimate, and more serious, effect is a loss of public respect for the law and law enforcement agencies." *United States* v. *D'Angiolillo,* 340 F.2d 453, 456 (CA2 1965).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted .

Respectfully submitted,

EDWARD S. PANZER
Attorney for Petitioner
299 Broadway
New York, New York 10007
(212) 349-6128

CHARLES F. AXELROD
PAUL E. WARBURGH, JR.
Of Counsel

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the 20th day of May, one thousand nine hundred and eighty.
Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS
Circuit Judges

80-1033

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSE PATINO,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit.

After his motion to suppress various items of evidence was denied, appellant pleaded guilty to conspiracy to violate the narcotics laws but reserved his right to challenge on appeal the denial of his motion. We agree with the district court's disposition of the motion, substantially for the reasons set forth in Judge Neaher's memorandum and order, dated December 28, 1979. Based on the record before us, the district judge did not err in concluding that the investigatory stop of appellant was based on reasonable suspicion and that appellant voluntarily consented to the subsequent searches conducted by the agents. Moreover, the failure of the agents to give appellant *Miranda* warnings before his arrest would not require the suppression of the statements appellant had made consenting to the various searches. See *United States* v. *Faroulo*, 506 F.2d 490, 495 (2d Cir. 1974). Finally, although we do not condone any possible misconduct by Detective Robinson during the course of the investigation, we agree with the district court that under the facts of this case dismissal of the indictment would not be an appropriate remedy.

/s/ Henry J. Friendly
HENRY J. FRIENDLY
/s/ Wilfred Feinberg
WILFRED FEINBERG
/s/ William H. Timbers
WILLIAM H. TIMBERS
Circuit Judges

Appendix B—Memorandum and Order of United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA,

v.

JOSE PATINO-ZAMBRANO, Defendant.

No. 79 CR 465.

United States District Court,
E. D. New York

Dec. 28, 1979.

Proceeding was instituted on motion to suppress evidence in narcotics prosecution. The District Court, Neaher, J., held that: (1) agents had reasonable suspicion to stop defendant and to detain him briefly when he left apartment which had been under surveillance, and (2) scope of stop was not impermissibly broadened by agents' request that defendant accompany them into apartment because any further detention and search of certain bags in apartment were valid as based upon defendant's consent.

Motion denied.

Edward R. Korman, U. S. Atty., Eastern District of New York, Brooklyn, N.Y. by Rhonda C. Fields, Vivian Shevitz, Asst. U. S. Attys., Brooklyn, N.Y., for plaintiff.

Axelrod & Warburgh, New York City by Paul E. Warburgh, Jr., New York City, for defendant.

MEMORANDUM AND ORDER

NEAHER, District Judge.

Following a three-day evidentiary hearing and denial of his motion to suppress various items of evidence, defend-

ant pleaded guilty to a one count indictment charging him with conspiracy to distribute and possess with intent to distribute quantities of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846. He reserved his right to challenge the court's denial of his motion pursuant to procedure approved in cases such as *United States* v. *Vasquez,* —— F.2d ——, ——, n. 2 (2 Cir., November 30, 1979); *United States* v. *Vasquez-Santiago,* 602 F.2d 1069, 1070 n. 2 (2d Cir., 1979); *United States* v. *Price,* 599 F.2d 494, 496 n. 1 (2 Cir., 1979). The following constitutes the court's findings of fact and conclusions of law on the motion to suppress.

Acting on information provided by a confidential informant whose reliability had been tested, DEA agents in a joint effort with State authorities began investigation of an allegedly large scale cocaine ring operating in the Queens area. The organization was reported to be highly sophisticated in its use of "stash locations" for money and cocaine, electronic beeper systems and new cars with switched license plates. One such vehicle was specifically identified by the informant as a red Chevrolet bearing a license number 757-JKB.

On September 25, 1978, the agents received information from their informant (allegedly employed by the drug ring itself) that a cocaine transaction would occur later in the day at a location in the vicinity of 67th Avenue and Queens Boulevard. Nelson Gomez was arrested that day in possession of a brown paper bag containing approximately one kilogram of cocaine, after meeting with a man who met him in a new red Chevrolet bearing license number 916-IAX. The agents attempted but were unable to keep the vehicle under surveillance.

Further investigation revealed that a red Chevrolet bearing license number 573-FEJ and apparently belonging to an "Antonio Villa" was the car whose vehicle identification number matched that of the Chevrolet previously bear-

ing license 916-IAX, which was involved in the foregoing narcotics transaction. Agents observed the car parked at 108-50 62nd Drive, Queens, in an underground parking space, which belonged to the occupant of apartment 5E, "Antonio Villa." The superintendent of the building later identified "Villa" from a photograph the agents knew to be that of Victor Crespo, a reputed "kingpin" of the Queens cocaine traffic.

On October 6, 1978, the agents observed a blue Buick with license plate number 609-HZC in front of 108-50 62nd Drive. Investigation disclosed that license number 573-FEJ was issued to the blue Buick although it was then on the red Chevrolet parked in the garage at 108-50 62nd Drive. Surveillance of the blue Buick between October 4 and 12, 1978, led the agents to believe that it was being used in a series of narcotics transactions and, on the 12th of October, two individuals, Edgar Lopez Cardona and Gustavo Ceballos, were arrested at 85-25 68th Road in Queens. The agents discovered in apartment 4-G at that address over $127,000 in currency, an arsenal of weapons, five pounds of cocaine and various records. The superintendent of that building identified a picture of Victor Crespo as looking like the man who rented the apartment.

At approximately the same time, Theodoro Hernandez was arrested. He had been one of the men identified as participating in the transactions that occurred during surveillance of the blue Buick. Agents seized a small red book with notations, among them a number, "VIPER 556 9612," which recorded voice-activated beeper messages.

The following day, October 13, 1978, the agents attempted to locate the last man identified as a result of surveillance of the Buick. At apartment 2G of 99-44 62nd Avenue, Queens, thought to be occupied by a male identified as "Shorty," the agents discovered a small quantity of cocaine and two kilograms of cutting materials. The man-

agement of the building identified a picture of Victor Crespo as the man who rented the apartment.

Defendant first entered the scene a few days earlier, although Detective Robert Johnson testified that Patino's name first turned up in the investigation after the arrest of Gomez September 25, 1978. On October 10, 1978, the agents observed defendant driving a red Chevrolet bearing license number 757-JKB in the vicinity of 108-50 62nd Drive in Rego Park Queens, both the car and the address being already associated with the investigation through information provided by the confidential informant. Defendant drove in an evasive manner to La Guardia Airport, went to the Sheraton Hotel, wore a voice-activated beeper in his belt and finally proceeded to Corona where he entered an automobile repair shop called Enfa Auto Repairs.

At the garage defendant was observed opening the trunk of another red Chevrolet bearing license number 916-IAX, identified as being used during a narcotics transaction on September 25, 1978. He returned to his own vehicle and drove to a travel agency in Queens, Cupido Travel, later asserted to be his place of employment. While defendant remained inside the agency, another male drove his vehicle, license 757-JKB, away and returned 30 minutes later. Patino promptly walked out of the agency and proceeded to 85th Street where he met Alonzo Isaza-Zapata. They next met another man, Helder Victoria Pulgarin, who removed a brown manila envelope from the trunk of a Volkswagon and handed the envelope to defendant. All three men drove back to the vicinty of Cupido Travel. Patino went to the trunk of his car, 757-JKB, removed a brown bag, handed it to Isaza, who then drove away with Victoria. The agents followed Isaza and Victoria and arrested them shortly thereafter in possession of a number of weapons

subsequently found to have been stolen from an interstate shipment. Also found were various documents in Victoria's possession, which included a list of numbers, among them "VIPER 556-9612," the same number found upon the earlier arrest of Hernandez, and the number "FER 441-0959,'' listed to Fernando Carmona at 85-31 120th Street, Queens, apartment 4F.

On January 15, 1979, agents of the DEA observed defendant at the International Arrivals Building at JFK Airport. Ther he met a man and a woman arriving on a flight from Colombia. The agents recognized the male as Victor Crespo, although this was not the name he gave the agents upon questioning.

On February 1, 1979, agents again observed Patino and Crespo, this time at 175-20 Wexford Terrace. Patino and Crespo entered a car and Patino drove to Farmingdale Airport, from which they departed on a charter aircraft. On their return, Patino drove Crespo back to Wexford Terrace.

Patino was next observed on February 2, 1979, when he delivered dry cleaned clothes to apartment 15X, 175-20 Wexford Terrace, which had been rented to Crespo and his wife in September 1978. Patino then drove his vehicle in front of the building and picked up Victor Crespo. They proceeded to an address on 120th Street and picked up a third male, identified as Fernando Carmona, who had been previously linked to the cocaine organization (Carmona's telephone number was found upon the arrest of Victoria on October 10, 1978). Carmona and Crespo then purchased tickets for a Delta Airlines flight.

Investigation beginning in April 1979 led the agents to interview the management of an apartment building at 41-40 Union Street. Apartment 1F was leased to a Yolima and Gaston Charles, whose lease application disclosed an

association with a jewelry shop linked to a woman suspected of being a major cocaine trafficker, Irma Mejia. Analysis of telephone records at the number listed at 41-40 Union Street reflected numbers also called by the occupants of apartment 15X, 175-20 Wexford Terrace.

On July 10, 1979, Detective Robinson of the New York City police interviewed the superintendent at 41-40 Union Street. He was advised that the superintendent had not seen anyone in or about apartment 11F for some time. According to Detective Robinson, the superintendent offered to knock to see if anyone was occupying the apartment. After the superintendent opened the door, Robinson looked inside and observed on the dining room table a machine, which he recognized as one for detecting counterfeit money, an adding machine and various other items consistent with illegal activity. He then entered the living room, examined some of the items and saw an entry of $100,000 on the adding machine tape. The following day agents placed a pen register on the telephone at 41-40 Union Street.

In the subsequent days, information provided by the superintendent and handy man at 41-40 Union Street revealed activity at the apartment, which strengthened the agents' belief that certain individuals were using the apartment to conduct an illegal enterprise.

Finally, on July 26, 1979, the events leading to defendant's arrest occurred. At approximately 3:30 p. m., information was provided to the agents that a male hispanic had arrived at 41-40 Union Street and had entered apartment 11F. Contemporaneous examination of the pen register tape revealed an outgoing call to a number Special Agent William Mochler, the agent in charge of the investigation, recognized as one for the voice-activated electronic beeper associated with the organization. The agents main-

tained surveillance outside apartment 11F throughout the afternoon.

At approximately 6:15 p. m., a male hispanic left apartment 11F and locked the door with a key. Upon seeing the agents in the hallway, the man hesitated but then walked to the elevator. Although the facts are disputed from this point, the court credits the testimony of the agents and finds that subsequent events unfolded in substantially the following manner.

Agent Mochler identified himself as a federal agent and asked to speak with the man. Although defendant testified that he was subjected to a frisk, it is undisputed that he did identify himself as Jose Patino. He then agreed to answer the agents' questions. He responded that he had gone to the apartment to pick up the two bags he was carrying for a friend and had taken a nap while at the apartment. He also responded that a black bag in his possession contained a money counting machine, which at Mochler's request defendant permitted him to inspect; he stated he had picked the machine up for some friends and that the apartment belonged to Yolima Charles. Defendant thereafter gave the agents permission to inspect a maroon bag he was also carrying and, after denying that the apartment contained anything illegal, opened the door of the apartment with his set of keys and permitted the agents to enter to see for themselves. A search of the apartment was conducted after defendant told the agents he had no objection to such a search.

While the search was being conducted, the agents asked Patino if they could search through the maroon leather bag, which he claimed belonged to his friend. He responded that he had no objection since the bag was not his. Search of this bag disclosed certain money order receipts for apartment rentals, a voice-activated beeper and an airline ticket for a flight to Baltimore the following morning. Ac-

cording to the agents' testimony, the beeper was activated during their examination of the contents of the bag and a male hispanic voice stated in an excited tone, "Pepe, que pasa, que pasa, Pepe?" Agent Mochler thereupon directed other agents to go to apartment 1CC at 61-01 Burns Court, Forest Hills, Queens, an address appearing on one of the receipts found in the maroon handbag, as well as to other locations revealed by the contents of the bag.

After leaving 41-40 Union Street, Patino agreed to accompany the agents to an address on 88th Street in Jackson Heights, Queens, which Patino claimed was his own apartment. Unable to enter that apartment because one of Patino's friends allegedly possessed the key while he was painting the apartment, Patino agreed to go with the agents to the Burns Court address to meet the other agents.

Arriving at the building at 66-01 Burns Court, Agent Mochler asked Patino if he had ever visited the address before. He admitted that he had been there before to visit friends. He permitted the agents to use a set of keys found in the maroon bag to attempt to see if any of them fit locks to apartments in the building, stating that he had no objection to use of the keys since he claimed they were not his. At the same time, other agents had determined that it was not possible to ascertain whether or not apartment 1CC was currently occupied since there were heavy draperies over the windows. Agent Mochler did see a light in the apartment by looking under the door. Accordingly, the agents entered the apartment with guns drawn using one of the keys found in the maroon bag.

They immediately smelled cocaine and, while checking to see if anyone was in the apartment, observed in an open closet large clear plastic bags of white powder later found to contain approximately 40 pounds of cocaine. They

also observed an arsenal of weapons and other miscellaneous items. The apartment was thereafter searched pursuant to warrant.

After the agents returned from their investigation of apartment to 1CC, Patino declined to answer any further questions without the assistance of a lawyer. He was then placed under arrest and read his *Miranda* rights. *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Discussion

Defendant contends that all the items seized from the apartments and statements taken during the course of the extended investigation should be suppressed because obtained in violation of his Fourth and Fifth Amendment rights. In analyzing these claims, we must begin with a determination of the propriety of the agents' actions when they first stopped Patino outside apartment 11F at 41-40 Union Street. Although the government urges that the court find no Fourth Amendment "seizure" since it claims Patino was restrained by neither physical force nor show of authority, see *United States* v. *Price,* 599 F.2d 494, 498-99 (2 Cir. 1979); *United States* v. *Wylie,* 186 (U.S.App. D.C. 231, 236-237, 569 F.2d 62, 67-68 (D.C.Cir 1977), *cert.* denied, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978), it is apparent that the initial encounter most certainly fell within limits of the investigatory stop doctrine of *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967).

[1] As Judge Kaufman noted in his concurring opinion in *United States* v. *Vasquez, supra,* this conclusion would have given the court little reason to pause were it not for "contrary dicta" of *Dunaway* v. *New York,* —— U.S. ——, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). There the Court intimated that the *Terry* doctrine may be confined to protective searches for weapons and may not be used to jus-

tify the investigative stops on reasonable suspicion with which we have become familiar. See also *Ybarra* v. *Illinois*, —— U.S. ——, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). Holding to the view that *Terry* is not so limited until instructed otherwise by a higher court, the panel in *Vasquez* determined over Judge Oakes' dissent that the officers' right to make the initial stop depends on a reasonable belief that the suspect is engaging in criminal activity, regardless of whether he is also armed and dangerous. *United States* v. *Vasquez, supra,* at ——. As the Court stated in *Adams* v. *Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972),

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response."

Thus, investigation of possible criminal behavior, including brief detention for questioning, is permissible even though there is no probable cause to make an arrest as long as the agents are able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *See Brown* v. *Texas*, —— *U.S.* ——, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-81, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Terry* v. *Ohio, supra,* 392 U.S. at 21-22, 88 S.Ct. 1868. *See also United States* v. *Vasquez, supra; United States* v. *Nieves*, 609 F.2d 642, 647-648 (2 Cir. 1979); *United States* v. *Price, supra,* 599 F.2d at 500.

[2, 3] Upon such facts, "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain

the status quo momentarily while obtaining more information may be most reasonable . . .'' *Adams* v. *Williams, supra,* 407 U.S. at 146, 92 S.Ct. at 1923. *See United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 882-83, 95 S.Ct. 2574. Moreover, the Court of Appeals for this circuit recently recognized that in appropriate circumstances the *Terry* doctrine authorizes not only investigative stops but also temporary detention of suspects and removal to a location more conducive to effective interrogation. *United States* v. *Nieves, supra,* at 648, *citing United States* v. *Oates,* 560 F.2d 45, 56-61 (2 Cir. 1977).

[4, 5] Applying these principles, the court finds that the initial encounter in the hallway of 41-40 Union Street justified as based on reasonable suspicion. It is settled that the common areas of an apartment building are public places in which individuals do not have a reasonable expectation of privacy. *See, e. g., Sibron* v. *New York,* 392 U.S. 40, 50, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States* v. *Reed,* 572 F.2d 412, 423 (2 Cir.), *cert. denied,* 439 U.S. 912, 99 S.Ct. 283, 58 L.Ed.2d 259 (1978). Thus, the agents were justified in seeking to maintain the status quo by attempting to question Patino briefly in the hallway. The information known to the agents, moreover, when they first observed Patino leave the apartment amply satisfied the requirement of articulable facts sufficient to warrant under the *Terry* doctrine the limited intrusion that occurred. Investigation of the Union Street apartment revealed an association with a woman suspected of being a major cocaine trafficker through information supplied by a reliable confidential source. Analysis of telephone records at the Union Street apartment reflected numbers also called by the occupants of apartment 15X of 175-20 Wexford Terrace, an apartment associated with Victor Crespo, under investigation as a major narcotics trafficker. Infor-

mation provided by the superintendent and handy man at the Union Street address revealed behavior consistent with the agents' experience with other apartments employed by the particular drug operation under investigation. Finally, examination of the pen register on the telephone at Union Street after the male hispanic arrived there on July 26, 1979, indicated that calls identified with the beeper system known by that time to be part of the organization's mode of operation had been made. Thus, as the agents waited outside the apartment, their belief that the apartment was being used by a drug organization and that the occupant was associated with it went far beyond mere suspicion or intuition.

[6] When Patino left the apartment, moreover, the agents' reasonable suspicion that he was connected in some manner with those under investigation was confirmed. Agent Mochler testified that he recognized Patino as the male seen driving a red Chevrolet 757 JKB on October 10, 1978, specifically identified by a reliable confidential informant as being used by members of the drug organization. This was the same day upon which Patino was observed with Isaza and Victoria shortly before their arrest for possession of weapons found to have been stolen from an interstate shipment. The agents also recognized Patino as the man observed opening the trunk of a vehicle that had delivered cocaine to Nelson Gomez on September 25, 1978, shortly before his arrest. Finally, the agents identified him as the man who had chauffeured Victor Crespo, identified by reliable confidential sources as a "kingpin," at various times in January and February 1979. Thus, there was more than ample cause to stop Patino as part of the agents' continuing investigation when he left the Union Street apartment. The fact that the agents did not know the true identity of the individual they were about

to stop until immediately before they had actually made the initial encounter is completely irrelevant in these circumstances.

[7] Here, the agents maintaining surveillance on the Union Street apartment suspected of having a connection with the drug organization under investigation immediately approached and stopped Patino when he left the apartment. They thereupon identified themselves and asked Patino for his identification. In view of the agents' knowledge of the operation of the drug organization and their reasonable suspicion of the Union Street apartment and Patino as a part of it, this initial stop falls within the category of less intrusive seizures that satisfy the Fourth Amendment on grounds less rigorous than probable cause. *See United States* v. *Vasquez, supra,* at ——, *citing Dunaway* v. *New York, supra,* 99 S.Ct. at 2255; *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 880, 95 S.Ct. 2574.

[8] The Supreme Court's recent decision in *Ybarra* v. *Illinois, supra,* —— U.S. ——, 100 S.Ct. 338, 62 L.Ed.2d 238, does not require a different result. There the Court determined that a warrant based on probable cause to search a tavern and its bartender could not be read to authorize a search of each patron of the bar who happened to be there. It rejected the State's argument that a *Terry* pat-down search was justified in the circumstances, which it claimed yielded the probable cause to support a subsequent warrantless search based on the exigencies of the situation. While the Court did note in *Ybarra* that the Fourth and Fourteenth Amendments provide individualized protection against unreasonable searches and unreasonable seizures, —— U.S. at ——, 100 S.Ct. 338, we are not confronted here with a "generalized" cursory search for weapons found repugnant by the Court in *Ybarra.* On the contrary, the agents here had every reason to suspect

that the individual who had access to the apartment at Union Street, who upon entry used the telephone to dial numbers associated with the beeper system employed by the drug organization under investigation, and who was identified upon leaving the apartment as an individual observed on a number of occasions in circumstances strongly suggesting his relationship to participants in the operation, was no mere bystander or innocent occupant of the premises. The agents clearly had reasonable suspicion to stop Patino and detain him briefly for the purpose of identifying himself and explaining the circumstances of his presence at the Union Street location. The facts suggest no generalized seizure but the essence of good police work.

[9, 10] While defendant's principal argument is premised on his claim that there was no basis whatever for a *Terry* stop, implicit in his further argument that statements were taken in violation of his Fifth Amendment rights is a contention that the agents exceeded the limited intrusion permitted by the *Terry* case; he appears to contend that the encounter proceeded beyond a mere investigatory stop at the moment the agents recognized Patino and developed into an actual arrest or "investigatory seizure" prohibited by the decision in *Dunaway* v. *New York, supra. See United States* v. *Nieves, supra,* 609 F.2d at 648 n.10. *See also United States* v. *Vasquez-Santiago, supra,* 602 F.2d 1069. As the court noted in *United States* v. *Oates, supra,* 560 F.2d at 58, however, "the issues involved in determining the propriety of stops, arrests and searches must be resolved by an objective rather than a subjective standard" (footnote and citations omitted). Viewed in this manner, Patino's detention in the hallway for the purpose of determining his association with the apartment under surveillance and his presence at a location under suspicion of being used in

narcotics trafficking was clearly a permissible stop under the *Terry* rationale and not an arrest. *Cf. Ybarra* v. *Illinois, supra; Dunaway* v. *New York, supra.*

[11-13] Assuming, moreover, that the scope of the initial stop encompassed Patino's re-entry into the apartment with the agents, the credible evidence supports a finding that Patino voluntarily acquiesced in the agents' request that they return to the apartment, which is clearly consistent with the conclusion that Patino was not under arrest at that time. *See United States* v. *Nieves, supra,* 609 F.2d at 648 n.10. As in *United States* v. *Magda,* 547 F.2d 756 (2 Cir. 1976), *cert. denied,* 434 U.S. 878, 98 S.Ct. 230, 54 L.Ed.2d 157 (1978), the scope of the particular intrusion was not unreasonably related to the purpose for the initial stop: the agents entered the apartment with Patino's agreement to confirm information he provided. The agents had not drawn their guns. Patino was not placed in handcuffs. The agents did not harass or intimidate him; the credible evidence revealed that he was not physically restrained or humiliated in any manner. Patino was simply asked certain questions designed to ascertain his identity and association with the apartment, and later asked if he would have any objection to the agents accompanying him into the apartment from which he had just exited. While this request could perhaps be justified by a legitimate desire to remove Patino to a location more conducive to effective interrogation (although not as a pretext to gain entry to the apartment to conduct an otherwise unlawful search), see *United* v. *Nieves supra; United States* v. *Oates, supra,* or to investigate further the circumstances under which the agents confronted Patino, it most certainly did not transform the initial stop into an arrest, *see United States* v. *Thevis,* 469 F.Supp. 490, 501 (D.Conn.), *aff'd,* (2 Cir. 1979); *United*

States v. *Wylie, supra,* 569 F.2d at 77. *See also United States* v. *Thompson,* 558 F.2d 522, 524 (9 Cir. 1977), *cert. denied,* 435 U.S. 914, 98 S.Ct. 1466, 55 L.Ed.2d 504 (1978) (use of force to compel investigatory detention after all-night surveillance does not transform a proper stop into an arrest). The situation is simply unlike that presented in *Dunaway* v. *New York, supra,* where the police seized petitioner from his home and transported him to the police station for custodial interrogation without probable cause to do so. *See United States* v. *Nieves, supra,* at 648 n.10.

[14, 15] The scope of the *Terry* stop was not impermissibly broadened by the agents' request that Patino accompany them into the apartment, moreover, since the court finds that any further detention and the searches of the bags and the Union Street apartment were valid as based on Patino's consent. See *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 881-82, 95 S.Ct. 2574; *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 567, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). See also *Dunaway* v. *New York, supra,* 99 S.Ct. at 2256. Although mere acquiescence to lawful authority or submission to express or implied coercion cannot validate a search, *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Bumper* v. *North Carolina,* 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States* v. *Price, supra,* 599 F.2d at 503, the government can show that the consent was freely and voluntarily given from the totality of all the circumstances, *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 27, 93 S.Ct. 2041; *United States* v. *Price, supra,* 599 F.2d at 503. Here, the government has made such a showing.

The credible evidence revealed that the agents confronted Patino in the public hallway outside the apartment. The agents were not uniformed officers and did not have

their guns drawn when they made their initial contact. After identifying themselves, they proceeded to inquire into Patino's identity and association with the apartment under surveillance. They further inquired into the contents of the two bags Patino was carrying out of the apartment. To these questions, Patino replied that he had no objection to the agents looking inside the bags. After voluntarily answering certain other questions about the contents of the apartment, Patino told the agents they could go inside. Patino unlocked the door with the set of keys he held, and once in the apartment told the agents that he had no objection to their looking around to determine if there were anything there of an illegal nature. He stated he had no objection since he claimed it wasn't his apartment. Until this time, the agents had neither frisked Patino nor touched him in any manner. Only two agents were present.

Thereafter, other agents arrived and conducted a thorough examination of the apartment. During the search, Patino sat in the living room and answered again that he had no objection to a search of the maroon bag since he disclaimed ownership of its contents with the exception of a small leather bag containing his wallet and a newspaper.

[16, 17] The court's independent observation of Patino when he testified during the suppression hearing supports the finding that he was in no manner overborne and that his consents were freely and voluntarily given. Patino appeared a composed and mature man of approximately 29 years of age. He answered questions put to him responsively and intelligently. While he testified through a Spanish language interpreter, he admitted living in this country for over 12 years and speaking and comprehending English with ease. He made no claim that he at any time

failed to understand what was occurring or the agents' various questions and requests. In these circumstances, the case is almost indistinguishable from the facts of *United States* v. *Price, supra,* 599 F.2d at 503, in which the court observed that

> "Price's disclaimer that the bag was not his and that the agents could do whatever they wanted with it was anything but ambiguous. It clearly signified consent to the requested search of the bag which had been in his exclusive possession at least from the moment he was spotted by Agent Whitmore."

Accordingly, since the court credits the testimony of the agents as to the facts surrounding Patino's consent to the searches and not his own testimony as to his subjective fears of DEA agents, the government has clearly met its burden of proving that the consents were voluntarily given.

It is the court's conclusion, moreover, that Patino also voluntarily agreed to accompany the agents to the apartment at 37-43 88th Street claimed to be his own residence. After satisfying themselves that the circumstances did not warrant further immediate investigation at 88th Street, the agents proceeded, again with Patino's agreement to 66-01 Burns Court, one of the addresses disclosed by the search of the maroon bag Patino carried out of the Union Street apartment.

[18] The facts established at the evidentiary hearing fully support the conclusion that Patino voluntarily accompanied the agents. First, there is no suggestion in the record that he at any time requested that the agents permit him to leave. Moreover, while there can be little doubt that Patino was laboring under the knowledge of the extent of his participation in the drug organization under investi-

gation, his behavior was consistent with a belief that his compliance with the agents' requests was the most effective manner in which to deal with his precarious situation. Finally, when confronted at Burns Court by the agents' discovery of the arsenal of weapons and drugs, Patino was wholly in control of his faculties and immediately informed the agents that he no longer desired to cooperate before speaking with an attorney. It is plain his compliance to that point was tactical and hence sufficiently voluntary to render the circumstances of his detention wholly distinguishable from those found objectionable in *Dunaway* v. *New York, supra.*

[19] Having determined that Patino voluntarily accompanied the agents to the various apartments, there remains the question of the propriety of the entry into the apartment at 66-01 Burns Court. Although the government argues with some force that exigent circumstances justified the warrantless entry into the apartment,[1] we prefer a ground more consistent with the conclusions we have already reached. For the reasons stated with respect to Patino's consent to search the bags and the apartment at Union Street, Patino's disclaimer that the keys in his possession were not his and that the agents could do as they liked with them clearly signified his consent to the search of the apartment at 66-01 Burns Court that the key would open, as proposed by the agents. Having made such a disclaimer, Patino cannot be heard to complain that the

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[1] The government contends that the exigencies of the situation justified the warrantless entry. It suggests that delay in obtaining a warrant would have permitted the loss or destruction of evidence or risked loss of capturing Victor Crespo, who they "believed" was in the Burns Court apartment. In view of the court's ruling on the issue of consent, it is unnecessary to decide whether the entry was proper under *United States* v. *Reed, supra.*

evidence discovered at 66-01 Burns Court can be offered against him.[2]

[20] One final point must be briefly addressed. Defendant claims that he is entitled to dismissal of the indictment because of alleged misconduct during the course of the investigation. He suggests that Detective Robinson's entry into the apartment at 41-40 Union Street on July 10, 1979, fatally tainted the indictment, and invokes the court's supervisory powers under cases such as *United States* v. *Jacobs,* 547 F.2d 772 (2 Cir. 1976), *cert. dismissed,* 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978), and *United States* v. *Estepa,* 471 F.2d 1132 (2 Cir. 1972).

[21] This "most drastic remedy," *United States* v. *Fields,* 592 F.2d 638 (2 Cir. 1978), *cert. denied,* —— U.S. ——, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979), however, is justified to achieve one or both of two objectives:

> "first, to eliminate prejudice to a defendant in a criminal prosecution; second, to 'help translate the assurances of the United States Attorneys into consistent performance.'" *Id.* at 647 (footnotes omitted).

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[2] The government contends that Patino lacks the requisite "legitimate expectation of privacy" in both the Burns Court and Union Street apartments to confer standing to challenge the searches. *See Rakas* v. *Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Although defendant's assertions at the time he was stopped in the hallway in Union Street and at the hearing were inconsistent in material respects, we resolve our doubts in favor of conferring standing in view of our disposition of the merits. Here, defendant was stopped having possession of keys and money orders for payment of rent connecting him with the apartments searched. Taken together with his assertions of ownership at the hearing, while perhaps self-serving, they are sufficient to establish defendant's right to challenge the government's actions. *See United States* v. *Ochs,* 595 F.2d 1247, 1253 (2 Cir. 1979).

Here, there is no evidence that prejudice to the defendant, if any, is of the character that can only be cured by dismissal. In fact, although Detective Robinson's entry into the apartment may not have been proper,[3] it is not evident that defendant suffers any prejudice since the investigation of the apartment began well before his entry and would undoubtedly have continued notwithstanding the entry. As the government points out, the DEA investigation had already revealed that the Union Street apartment had been rented by an individual not living at the apartment but who had actually returned to South America. It had also disclosed that a person suspected of being a major figure in the cocaine traffic was listed as a reference on the lease application, and finally that the telephone at the apartment had transmitted and received calls by persons at numbers also contacted by the occupants of Victor Cresop's apartment at Wexford Terrace. In these circumstances, the illegal intrusion, if one occurred, did not taint subsequent surveillance so as to render Patino's stop and indictment fatally defective. *See United States* v. *Falley,* 489 F.2d 33, 40 (2 Cir. 1973).

[22, 23] Nor do we believe that the facts warrant dismissal because of any widespread or continuous abuse or official misconduct. At worst, the police officer's entry was the result of a possibly mistaken belief that the superintendent's willingness to open the door entitled him to gain access to the apartment. Since there is no evidence that the entry in fact did more than confirm the government's suspicions that the apartment was being used as part of the drug organization under investigation, the officer's single mistaken appraisal of his authority, if such was the

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[3] *See Stoner* v. *California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); *Chapman* v. *United States,* 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961).

case, cannot standing alone vitiate the entire prosecution. *See United States* v. *Brown,* 602 F.2d 1073 (2 Cir. 1979).

[24] Finally, we agree that Patino's consent to searches of both his bags and the apartment at Union Street dissipated the taint, if any, of the officer's entry. See *United States* v. *Galante,* 547 F.2d 733, 740-42 (2 Cir. 1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *United States* v. *Mullens,* 536 F.2d 997, 999-1000 (2 Cir. 1976).

For these reasons the defendant's motion to suppress evidence was in all respects denied.

Appendix C—Constitutional Provisions Involved.

The Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution:

> "No person shall . . . in any criminal case . . . be deprived of life, liberty, or property, without due process of law. . . ."